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In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION,
Petitioner

v.

CONWAY CORPORATION, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE CITIES OF BATAVIA, GENEVA, NAPERVILLE, ROCK FALLS, ST. CHARLES, AND ROCHELLE, ILLINOIS

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Pursuant to Rule 42 of this Court, the Cities of Batavia, Geneva, Naperville, Rock Falls, St. Charles, and Rochelle, Illinois (herein called "River Cities") respectfully submit this brief amicus curiae in opposition to the position of the Federal Power Commission.[1]

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[1] Pursuant to Rule 42.2 of this Court, the written consent of all parties to the case has been obtained and filed with this brief.

Interest of Amicus Curiae

The River Cities are affected by the outcome of this proceeding. In 1970, Commonwealth Edison Company of Chicago (herein called "Edison"), one of the largest electric distribution companies in the world, filed a unilateral wholesale rate increase against the small River Cities at the Federal Power Commission under Section 205 of the Federal Power Act. In its filing, Edison increased the wholesale rates to the River Cities (under Rate 78) above the level of its retail rate for large industrial service (Rate 6). The River Cities contended before the Federal Power Commission that the disparity between the wholesale Rate 78 and the Company's large industrial Rate 6 discriminated against the Cities and precluded them from competing effectively with Edison for industrial as well as other retail customers in the area. The matter was thoroughly tried before Presiding Administrative Law Judge Ellis of the Federal Power Commission, who issued an initial decision on November 29, 1972,[2] ruling that Edison was discriminating against the municipals in violation of Section 205(b) of the Federal Power Act and ordering the wholesale rate (Rate 78) reduced to the level of Edison's industrial rate (Rate 6). On appeal by Edison to the full Federal Power Commission, the Commission reversed on the ground, *inter alia*, that the Commission lacked jurisdiction to protect wholesale customers served by a regulated utility under the Federal Power Act from discrimination resulting from the intrastate activities of that Company in setting its large industrial rates. *Commonwealth Edison Company*, 51 F.P.C. 86 (1974). The River Cities appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit,[3] which has stayed further action on the appeal

[2] Commonwealth Edison Co., 51 F.P.C. 86, 98 (1974).

[3] Batavia v. FPC, No. 74-1411 (D.C. Cir., filed Apr. 9, 1974).

pending the outcome of this Court's review of the case now before it, *FPC* v. *Conway Corporation*.[4]

Not only do the River Cities, petitioning as amicus curiae herein, have a vital interest in the outcome of the present case because it will likely govern the result of their pending appeal before the United States Court of Appeals on a similar issue below, but the impact and importance to the River Cities of the FPC's position recently has been greatly increased. For many years, Commonwealth Edison had kept its large industrial rate (Rate 6) and its wholesale rate to the River Cities (Rate 78) in tandem, with the wholesale rate being slightly higher. That was the issue involved before the Federal Power Commission in FPC Docket No. E-7578, to which Presiding Administrative Law Judge Ellis rendered his Initial Decision. However, after the FPC's decision declining jurisdiction in that case, Commonwealth Edison in 1974 instituted a new wholesale rate increase for the River Cities (FPC Docket No. E-9002) which completely abandoned the historic tracking of the two rates and greatly increased the wholesale customer rate level (Rate 78) above the industrial (Rate 6) level. The result has been that many of the Cities were forced to raise their retail rates above the retail rates of Commonwealth Edison, and/or be subject to a serious squeeze on their traditional earnings. Thus, in the absence of a decision upholding the jurisdiction of the Federal Power Commission to prevent discriminatory practices such as those directed against the River Cities by Commonwealth Edison Company, there will be a regulatory gap and no administrative remedy available for the protection of the River Cities or others similarly situated.

[4] No. 75-342; before this Court pursuant to a writ of certiorari issued to the District of Columbia Circuit to review the decision in Conway Corp. v. FPC, 510 F.2d 1264 (D.C. Cir. 1975).

Summary of Argument

I. The FPC does have jurisdiction under the Federal Power Act, 16 U.S.C. §§ 824 *et seq.* to remedy discrimination against interstate commerce from intrastate activities of a regulated utility. In support of its argument that it does not have jurisdiction, the FPC places great reliance on selected portions of the legislative history of the Act which purportedly indicate a congressional intent to preclude the *Shreveport* (*Houston, East & West Texas Ry.* v. *United States*, 234 U.S. 342 (1914)) doctrine from applying to federal regulation of electric utilities. However, the case before this Court is factually distinguishable from *Shreveport* and therefore the Commission's argument is irrelevant.

Even if the *Shreveport* issue were relevant, the plain language of Sections 205(b) and 201(b) of the Federal Power Act does not support the contention that FPC jurisdiction to remedy discrimination against interstate commerce is limited significantly more than the jurisdiction conferred upon the ICC by Sections 3 and 1 of the Interstate Commerce Act as construed by this Court in *Shreveport*.

Additionally, the legislative history of the Federal Power Act does not compel a conclusion different from what the plain language of the Act suggests. The Commission's reliance upon statements of an individual Congressman, or witnesses before Congressional hearings, which suggest a contrary result is not entitled to any weight. In fact, the legislative history more logically may be interpreted as supporting a clear grant of *Shreveport* scope jurisdiction to the FPC. Interpreting the Act in any other way would have the effect of creating a serious regulatory gap.

II. The FPC is obliged to consider the anticompetitive effect of non-regulated matters on interstate commerce. Failure to consider such conduct not only is contrary to

the broad mandate of both the Federal Power Act and the antitrust laws to preserve competition, but has the effect, as mentioned above, of creating a regulatory gap. The fact that the FPC might not be authorized to *regulate* certain conduct which affects jurisdictional matters does not justify its ignoring the anticompetitive activity when setting jurisdictional rates.

III. The specific relief requested and granted below is a proper means of eliminating an anticompetitive price squeeze. The reduction of jurisdictional rates to eliminate a price squeeze created by depressed non-jurisdictional rates can not be considered unjust or unreasonable. It certainly is not improper to eliminate an anticompetitive price squeeze by setting a jurisdictional rate at a lower level, but one which still falls within the zone of reasonableness. In such a case the customer is protected from the injury of the price squeeze, and it cannot be said that the utility is suffering if the rate still falls within the zone of reasonableness. In delimiting the zone of reasonableness, the voluntary action of a utility in maintaining a comparable non-jurisdictional rate at a low level suggests that it is a reasonable level and should have great weight in deciding whether it is unreasonable to reduce the higher rate.

Additionally, it also is not improper to set the rate at an apparent confiscatory level if such action is necessary to eliminate the anticompetitive effect of predatory pricing by a utility.

ARGUMENT

I

THE FEDERAL POWER COMMISSION HAS THE AUTHORITY AND JURISDICTION TO REMEDY ESTABLISHED DISCRIMINATION BETWEEN JURISDICTIONAL RATES AND NON-JURISDICTIONAL RATES WHICH AFFECT JURISDICTIONAL RATES.

It is clear from the decision of the Court below[5] and the brief filed by the Commission with this Court that the relief sought by the muncipalities was action by the Commission to reduce the proposed *wholesale* rates to eliminate the price squeeze created by depressed non-jurisdictional rates. There is no question of relief in the form of Commission action to raise intrastate rates. Yet when looking to the legislative history of the Federal Power Act, the Commission finds significance in the concern of certain legislators over the implications of this Court's decision in *Houston, East & West Texas Ry.* v. *United States*, 234 U.S. 342 *(Shreveport)* to the remedial powers accorded the Commission in the proposed Power Act.[6] In *Shreveport* the Court found Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1) to be sufficiently broad to permit the ICC to remedy discrimination existing between interstate rates and intrastate rates by ordering an increase in intrastate rates.[7]

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[5] 510 F.2d at 1267.

[6] FPC Brief at 14.

[7] The Court first looked to the powers of Congress to regulate comerce and concluded:

> It is also clear that, in removing the injurious discrimination against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard, fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates, and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.
>
> Having this power, Congress could provide for its execution through the aid of a subordinate body . . . .

234 U.S. at 355. The Court then examined the specific language of the Act and concluded it was sufficiently broad to embrace and authorize the Commission act. *Id.* at 356.

The clear impact of the legislative history exchange relied on by the FPC (Br. 15-18) is that under the proposed act the Commission would not raise confiscatory intrastate rates nor would it permit interstate rates to rise above a just and reasonable level to offset the confiscatory intrastate rate. However, to appreciate the significance of these exchanges it is particularly important to bear in mind that the hypothetical posed by Congressman Pettengill (FPC Br. 15-16) involved a utility with non-jurisdictional rates *fixed* by a state Commission at a confiscatory level. Obviously, it is presumed that the utility would not want the rates at this level and therefore the proper procedure for the Company would be to remedy the situation in Court. It is an entirely different situation when the lower non-jurisdictional rates are voluntarily depressed by the Company.

Further, it is apparent that the exchange at pages 17 and 18 of the Commission's brief is concerned with the FPC *establishing local rates.* The issue now before this Court does not extend to that level. It is not alleged that the Municipalities are being discriminated against because they are not accorded rates identical to confiscatory intrastate rates *imposed* upon the utility by a state regulatory body. Rather it is charged that the utility has *voluntarily* depressed or elected to maintain depressed intrastate rates for the illegal purpose of removing the

interstate customer as a competitor. Such conduct is directly relevant to the reasonableness of the interstate rates and should be considered by the Commission. Thus, the legislative history cited by the Commission simply is not relevant to this case.

Since no relief is sought in the present case to reduce or affect intrastate rates, the *Shreveport* case is irrelevant and need not be considered. The *holding* of the Court below was that the Commission had interpreted its jurisdiction too narrowly. In the process of reaching its decision, the Court noted in *dicta* the Commission's contention that the *Shreveport* doctrine did not apply to the Federal Power Act and the selective portions of the legislative history which the Commission presented to support its contention.[8] The Court did not hold that the *Shreveport* doctrine did not apply to the Federal Power Act but rather concluded that it was not necessary to determine if *Shreveport* applied since

> [t]he "power over intrastate rates" and "the extension [of Federal control] into intrastate activities" that the *Shreveport* case permitted to the ICC goes far beyond the relief sought by petitioners. . . .[9]

However, the Commission appears to be basing the heart of its appeal on some slender threads garnered from the legislative history of the Federal Power Act relating to the *Shreveport* case. It is clear that the Commission is in error. The plain language of the Federal Power Act, its legislative history and Congress' clear desire to close the existing regulatory gap make it clear that the Commission has jurisdiction to remedy the discrimination complained of in the present case.

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[8] 510 U.S. at 1271.

[9] *Id.*

A. The Plain Language of Section 205(b) of the Federal Power Act Broadly Prohibits Any Undue Discrimination Being Undertaken by Regulated Utilities.

The pertinent language of the Federal Power Act, 16 U.S.C. § 824 *et seq.*, is parallel with the earlier language of the Interstate Commerce Act, which was held by the Supreme Court in *Shreveport* to have vested in the ICC all powers necessary to eliminate all undue discrimination being undertaken by regulated utilities. Section 205 (b) of the Federal Power Act, 16 U.S.C. § 824d, expressly provides as follows:

> No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

Section 3 of the Interstate Commerce Act, as quoted and construed in *Shreveport* as vesting in the ICC Congress' constitutional authority to prevent discriminatory intrastate activities against interstate commerce is indistinguishable:

> "Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."[10]

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[10] 234 U.S. at 355-56.

The FPC seeks to argue that the words in Section 205 (b) "with respect to any transmission or sale of electricity subject to the jurisdiction of the Commission" distinguishes Section 205(b) from Section 3. However, the words of Section 3, that it shall be unlawful for any common carrier "subject to the provisions of this Act" to engage in activities similar to those described in Section 205(b) have the exact same legal effect. In both cases, the reference is to jurisdictional provisions in other sections of the respective Act. The parallelism between the other language of Section 3 of the Commerce Act and 205(b) of the Power Act is also clear; in both cases the language clearly does not bar the regulatory agency from protecting the interstate commerce subject to its jurisdiction from discrimination by intrastate activities of the regulated companies. If Congress had so intended to restrict either Section 3 or 205(b) solely to activities in interstate commerce it could have limited the jurisdiction to remove discrimination solely to classes of service subject to the jurisdiction of the Commission.

Similarly, the plain language of Section 201 of the Federal Power Act, relating to the FPC's jurisdiction, is substantively the same as Section 1 of the Interstate Commerce Act, authoritatively construed in *Shreveport* as vesting in the ICC Constitutional power under the Commerce Clause to regulate intrastate activities discriminating against interstate commerce. The language of both Sections is almost identical and is indistinguishable in substantive effect. Section 1, par. (1) of the Commerce Act states that it applies to "the transportation of passengers or property . . . from one State . . . to any other State. . . ."[11] Section 201(b) of the Federal Power Act contains an identical grant of power over the "transmission of electric energy at wholesale in interstate commerce." Section 1, par. (1) of the Commerce Act also provides that the "provisions of this chapter shall apply to common carriers engaged in" interstate commerce, and parallels the reference in Section 201(b) of the Federal Power Act to "all facilities for such transmission or sale of electric energy."[12]

[11] 49 U.S.C. § 1(1).

Finally, both Section 201(b) of the Power Act and Section 1, par(2) of the Commerce Act contain identical provisos stating they shall not apply to solely intrastate activities. But as the Supreme Court held in *Shreveport*, these provisions did not bar the exercise of regulatory authority to prevent "unjust discrimination" by intrastate activities against interstate commerce, a matter completely different from any general authority to set intrastate rates.

Thus, an analysis of the plain language of Sections 205(b) and 201(b) of the Federal Power Act in relation to Sections 3 and 1 of the Interstate Commerce Act, as earlier construed by the Supreme Court in the leading *Shreveport* case, establishes clearly that the jurisdiction conferred by both is substantively identical in the transportation-transmission and subject-company provisions. Since Congress in enacting the Power Act used the same substantive language contained in the Commerce Act as construed in *Shreveport*, it could have intended a similar grant of its Constitutional powers to protect interstate commerce from discriminatory intrastate activities by regulated utilities.

B. The Legislative History of the Federal Power Act Clearly Supports FPC Jurisdiction To Prevent Undue Discrimination.

The portion of the legislative history upon which the Commission places its full reliance consists merely of the statements of witnesses (who were not members of Congress) before Congressional Committees, and a ran-

[12] 16 U.S.C. § 824(b).

dom comment of a single Congressman as to their personal interpretation of the applicability of the then proposed amendment to the Federal Water Power Act.[13]

This Court has held that statements by witnesses should not be accorded any weight in interpreting the meaning or scope of a statute:

> *Nor do we think of significance* the fact relied upon here and by the court below that *statements inconsistent with the conclusion which we reach were made to committees of Congress* or in discussions on the floor of the Senate by senators who were not in charge of the bill. For reasons which need not be restated, such individual expressions are without weight in the interpretation of a statute. See *Duplex Co.* v. *Deering*, 254 U.S. 443, 474; *Lapina* v. *Williams*, 232 U.S. 78, 90; *United States* v. *Trans-Missouri Freight Assn.*, 116 U.S. 290, 318.[14] (Emphasis added.)

Additionally, the Court of Appeals for the Second Circuit concluded in *Duquesne Warehouse Co.* v. *Railroad Retirement Board*, 148 F.2d 473, 488 (2d Cir. 1945):

> Appellee stresses the testimony of witnesses before Congressional committees as showing that the purpose of Congress was not to include such a company within the Act. But it has never been held that such testimony constitutes part of the legislative history bearing on the legislative intention." (Citations omitted.)

The one statement by a Congressman, i.e. Representative Cole, which the Commission cites is on its face purely an individual opinion:

> [W]e have *tried*—and I *think* successfully—to avoid the injection into the Federal control, which this

[13] FPC Brief at 15-18.

[14] McCaughn v. Hershey Choc. Co., 283 U.S. 488, 493-94 (1931).

> title confers, the extension thereof into intrastate activities in the way that the Shreveport case might permit.[15] (Emphasis supplied.)

This Court has warned against placing undue reliance on the statements of individual Congressmen concerning the meaning of a statute:

> There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. (Citations omitted.)
>
> The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed.[16]

In addition, it is of importance to note that the Public Utility Act of 1935 contained two parts: Title I was entitled "Control of Public Utility Holding Companies," i.e., the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79, *et seq.*; and Title II was entitled "Amendments to Federal Water Power Act," i.e., the Federal Power Act, 16 U.S.C. § 824, *et seq.* These two parts of the same Act were considered and passed together in both Houses of Congress. The Holding Company portion of the Act (Title I) gave even more freedom from federal regulation in its explicit terms to intrastate ac-

[15] 79 Cong. Rec. 10384 (June 28, 1935).

[16] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318-19 (1897); *accord*, McCaughn v. Hershey, *supra*, note 14.

tivities than did Title II, the Federal Power Act portion. This more lenient treatment in Title I was specifically noted during the Senate floor debate by Senator Barkley:

> Mr. BARKLEY. Mr. President, if the Senator from Montana will yield in that connection, let me say that the bill provides for exemption only under title I. Title II is the part of the bill which provides that rates and practices in the transmission of power and electric energy across State lines may be regulated. That is entirely different. We do that with respect to railroads which are almost entirely intrastate, but we can regulate their practices insofar as interstate traffic is concerned. We provide here not only for the exemption of companies which are wholly engaged within a State in the transmission of power and electric energy but even where there is an integrated company in two or more States in contiguous territory we provide that it likewise may be exempted from the provisions of title I. That, of course, does not apply to the regulation of the transmission of electric power across State lines, which is entirely different from the provisions of title I.
>
> The bill provides that even a holding company may continue to operate if it operates wholly within a State, or if it operates in half a dozen States in a contiguous territory so that its properties may be regarded as a system of utilities that have something in common.[17]

In the House, the Public Utility Act of 1935 was the product of the Committee on Interstate and Foreign Commerce. When the Act was reported to the House floor, Congressman Eicher, a member of that Committee, presented an analysis of Title I in which he agreed with Senator Barkley's interpretation of Title

[17] 79 Cong. Rec. 8442 (May 31, 1935); *accord*, statement by Senator Wheeler, 79 Cong. Rec. 8393-94 (May 29, 1935).

I, but he nevertheless concluded that the *Shreveport* doctrine applied:

> *The only companies regulated by the bill are those engaged in interstate commerce.* This appears from an analysis of several sections of the statute. Section 11 applies only to registered holding companies. Section 5 allows any holding company to register, and section 4 provides that unless a holding company is registered under section 5 it shall be unlawful for it to transmit through the mail or by any instrumentality of interstate commerce utility assets, sales or service contracts, or securities, or to engage in any business in interstate commerce. Thus, if a company does not engage in any interstate commerce it need not register and would not come within section 11. Moreover, the Securities and Exchange Commission, which is to administer this portion of the act, is required by section 3(a) to exempt any holding company from the provisions of title I of the act, if it deems the exemption not detrimental to the public interest when such holding company is "predominantly intrastate in character" and carrying on its business and the business of its subsidiary companies substantially in a single State. The exemptions granted to such companies would, of course, free them from the provisions of section 11. *It is clear, therefore, that intrastate transactions are in no wise sought to be affected unless they should be so intertwined with interstate transactions that "the government of the one involves the control of the other," in which event it is for Congress to prescribe the dominant rule under Houston, etc., Co. v. United States (234 U.S. 342).*[18] (Emphasis added.)

Thus, if Title I of the Public Utility Act of 1935, which by its express terms asserts less jurisdiction over intrastate activities than Title II, is governed by the *Shreveport* doctrine, then it follows that Title II of the

[18] 79 Cong. Rec. 10359 (June 28, 1935).

same legislation, i.e., the Federal Power Act, also could be interpreted as retaining the *Shreveport* command that when intrastate actions discriminate against and cause injury to the interstate market, the Federal Power Commission has the authority and duty to regulate the intrastate market to the extent necessary to eliminate the discrimination. Hence, at the very least the FPC may take the intrastate rate being charged by a utility into account when setting the interstate rate.

C. The Exercise of Jurisdiction by The FPC Is Necessary and Proper to Prevent A Regulatory Gap.

The key motivating force behind enactment of the Federal Power Act was the need to create a Federal authority to fill in the gaps in State regulatory powers. Efforts by the States to enact any regulation affecting interstate transportation, even to protect discrimination against intrastate activities, were forbidden under the Commerce Clause. *Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924). In *Kansas Natural Gas* the Court emphasized this limitation on state authority by quoting from *Simpson* v. *Shepard*, 230 U.S. 352 (1912) wherein Mr. Justice Hughes, speaking for the Court, said:

> "If a state enactment imposes a *direct burden* upon interstate commerce, it must fall, regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the state has directly restrained that which, in the absence of the Federal regulation, should be free".[19] (Emphasis in original.)

Three years later, in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), this Court found the holding of *Kansas Natural Gas*, also to be controlling over state attempts to regulate interstate electric transportation. The Court specifically

[19] 265 U.S. at 307-8.

concluded that "[t]he forwarding state obviously has no more authority than the receiving state to place a direct burden upon interstate commerce." [20]

Since the Commerce Clause included, under the Supreme Court's holding in *Shreveport*, the protection of interstate transportation from intrastate activities, it was crystal clear prior to 1935 that the entire subject of discrimination between intrastate and interstate commerce was a federal question within the exclusive power of Congress. Thus, when Congress came to enact the Public Utility Act of 1935, it was clearly established that the States lacked any authority to correct any discriminatory practices of intrastate activities on interstate commerce. Hence, the purpose of the Federal Power Act, like the Natural Gas Act passed three years later in 1938, was and is to grant the Federal Power Commission jurisdiction over *all* matters about which the states are precluded from taking action.

This Court recently has reaffirmed this purpose when it declared in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972), a case involving the Natural Gas Act:

> Although federal jurisdiction was not to be exclusive FPC regulation was to be broadly complementary to that reserved to the States, so that there would be no "gaps" for private interests to subvert the public welfare.

Thus, in order to protect the interstate consumers, the FPC was granted the authority by Congress to close all "gaps" where state regulation is not feasible. Furthermore, where the question of jurisdiction is a close one, this Court has mandated that FPC jurisdiction be found in order to avoid the creation of a regulatory gap:

[20] 273 U.S. at 89.

This congressional blueprint has guided judicial interpretation of the broad language defining FPC jurisdiction, and "when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created. Compare Guss v. Utah Labor Board, 353 U.S. 1. *That is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs.*" FPC v. Transcontinental Gas Pipe Line Corp., [365 U.S. 1], at 19-20 . . . .[21] (Emphasis added.)

II

THE ANTI-DISCRIMINATION PROVISIONS OF THE FEDERAL POWER ACT MUST BE READ AND ADMINISTERED IN LIGHT OF THE POLICIES OF THE FEDERAL ANTITRUST LAWS.

A. Sections 205 and 206 of the Federal Power Act Incorporate the Principles of the Federal Antitrust Laws Whereby the Commission is Required to Consider the Anticompetitive Impact of Discriminatory Rates.

It is well established that the policies of the federal antitrust laws are incorporated into the Federal Power Act,[22] and that said policies must be recognized in its administration.[23] With particular regard to Sections 205

[21] 406 U.S. at 631.

[22] *Gulf States Util. Co.* v. *FPC*, 411 U.S. 747 (1973). *See also Lafayette, La.* v. *SEC*, 454 F.2d 94 (D.C. Cir. 1971), *aff'd sub nom. Gulf States Util. Co.* v. *FPC*, 411 U.S. 747 (1973); *Municipal Elec. Ass'n* v. *SEC*, 413 F.2d 1052 (D.C. Cir. 1969).

[23] This responsibility is hardly novel. In numerous instances courts have held that administrative agencies, including the Federal Power Commission, must give consideration to these policies and make findings of fact and conclusions of law with respect thereto

and 206 of the Act, this Court concluded that in the disposition of rate matters arising under these provisions, the Commission must consider the anticompetitive impact of wholesale rate filings by electric utilities. In *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747 (1973) this Court stated:

> The Act was passed in the context of, and in response to, great concentrations of economic and even political power vested in power trusts, and the absence of antitrust enforcement to restrain the growth and practices of public utility holding companies. See S. Rep. No. 621, supra, at 11-12; Utility Corporations—Summary Report, 70th Cong, 1st Sess, S Doc No. 72, Part 73-A, 47-54; 79 Cong Rec 8392 (1935).
>
> In order to achieve federal regulation of these and other perceived problems on the operational level of the interstate public utility business, Tit II was enacted. S Rep No. 621, supra, at 17; HR Rep No. 1318, supra, at 7. Part II of Tit II was denominated the Federal Power Act, 49 Stat 863. *Title II* certainly did not preclude the operation of the antitrust laws, and it vested the Federal Power Commission with important and broad regulatory power in the areas described above. See Otter Tail Power Co. v. United States, 410 US 366, 35 L Ed 2d 359, 93 S Ct 1022 (1973); Meeks Concentration in the Electric Power Industry: The Impact of Antitrust

in the disposition of matters arising before them. *See*, e.g., *FMC* v. *Aktiebolaget*, 390 U.S. 238, 243-46 (1968); *Denver Rio Grande Western R.R.* v. *United States*, 387 U.S. 485, 492-98 (1967); *United States* v. *El Paso Nat. Gas Co.*, 376 U.S. 651 (1964); *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *California* v. *FPC*, 369 U.S. 482, 484-85 (1962); *United States* v. *Radio Corp. of America*, 358 U.S. 334 (1959); *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79-80 (1944); *Sabin* v. *Butz*, 515 F.2d 1061, 1069 (10th Cir., 1975); *Marine Space Encl.* v. *FPC*, 420 F.2d 577 (D.C. Cir., 1969); *Northern Nat. Gas Co.* v. *FPC*, 399 F.2d 953 (D.C. Cir., 1968); *Pittsburgh* v. *FPC*, 237 F.2d 741 (D.C. Cir., 1956).

Policy, 72 Col L Rev 64 (1972). *This power clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to §§ 202 and 203, and under like directives contained in §§ 205, 206, and 207.*[24] (Emphasis added.)

That the Commission is obliged to consider anticompetitive rates of electric utilities may also be seen from Justice Powell's dissent in *Gulf States*. Speaking for himself, Justice Stewart and Justice Rehnquist, Justice Powell joined the majority in this regard. Justice Powell found:

> It is common ground that the Commission has a responsibility to deal with anticompetitive practices in the power industry. Section 10 of the Act, 16 USC § 803 [16 USCS § 803], provides that the Commission may issue licenses to public utilities "on the following conditions," one of which is that:
>
> "(h) Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited." 16 USC § 803(h) [16 USCS § 803 (h)].
>
> *The question before the Court, then, is not whether the Commission has responsibility, but how and when it shall exercise it.*[25] (Emphasis added.)

In addition, Justice Powell noted with approval that the Commission had stated to the Court that it had also concluded that it had an affirmative statutory obligation to consider the anticompetitive effects of discriminatory wholesale rates:

[24] 411 U.S. at 758-59.

[25] *Id.* at 767-68.

> Stated abstractly, the Commission's position is that the most sensible method of regulating anticompetitive conduct is to focus on the conduct itself rather than on the means by which it may possibly be financed. *The Commission* acknowledges a duty to scrutinize allegedly anticompetitive behavior in proceedings . . . to review rates, §§ 205 and 206 of the Act, 16 USC § 824d and 824e . . . and to review a charge of unduly discriminatory rates or practices, § 205 of the Act, 16 USC § 824d. . . .[26] (Emphasis supplied.)

Action at the Commission level to investigate alleged antitrust violations provides an alternate administrative remedy to the traditional judicial remedies under the antitrust laws. As the Court noted in *Gulf States*:

> Consideration of antitrust and anticompetitive issues by the Commission, moreover, serves the im-

[26] *Id.* at 768. The Majority viewed the Commission's construction of Sections 205 and 206 in an identical light. Indeed, the only distinction between the majority and minority opinions turned on the Commission's responsibility under Section 204 of the Act, 16 U.S.C. § 824c. Writing for the Majority, Justice Blackmun found:

> Gulf and the Commission contend that antitrust considerations of the kind asserted by the Cities do not fall within the limited scope of § 204 as thus defined, and consideration by the Commission of such broad-ranging issues would be incompatible with the need for relatively fast action by the Commission when it passes upon a proposed security issue. *It is said that allegations of anticompetitive conduct properly may be raised and fully considered in other proceedings related . . . to rates and ratemaking practices under §§ 205 and 206,* 16 USC §§ 824d and 824e [16 USCS §§ 824d and 824e] . . . .
>
> Although allegations similar to those raised here may, indeed, be made in such other proceedings under the Federal Power Act, we do not regard that fact as determinative of the scope of Commission inquiry under § 204. Instead, the Commission's broad authority to consider anticompetitive and other conduct touching the "public interest" under the other sections of the Act emphasizes the breadth of its authority under the public interest standard generally and as embodied in § 204. Id. at 757-58. (Emphasis supplied.)

portant function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings.[27]

To make the courts the only source of relief from predatory pricing or other forbidden conduct by utilities subject to the Commission's jurisdiction constitutes an abrogation by the Commission of its legislative responsibility in this area.

Thus, it is clear that the policies of the federal antitrust laws must be considered in the administration of the discrimination provisions of the Federal Power Act.

B. The Federal Power Commission Must Evaluate Both Jurisdictional and Comparable Non-Jurisdictional Rates When Weighing The Antitrust Implications of Rates and Charges Subject to Its Jurisdiction.

The Commission does not contend that it is without the authority to investigate aspects of a utility's non-jurisdictional operations.[28] It acknowledges the propriety of examining *costs* to evaluate the reasonableness of their allocation between jurisdictional and non-jurisdictional accounts. It is in the matter of *rates* that the Commission elects to ignore reality and determine the issue of reasonableness in a vacuum. The Commission's argument that it may not consider non-jurisdictional rates when evaluating the reasonableness of comparable wholesale rates is clearly fallacious.

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[27] *Id.* at 760.

[28] In discussing *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635 (1945) at page 26 of its Brief to this Court, the Commission states: "To be sure, *Panhandle* supports the FPC's authority to review non-jurisdictional matters when relevant to a jurisdictional function. . . "

As discussed in Section I c of this Brief, *supra*, Part II of the Federal Power Act has as one of its primary objectives the establishment of a complete scheme of regulation for the electric power industry. This objective was well stated by Federal Power Commissioner Clyde L. Seavey at congressional hearings,[29] on the proposed Federal Power Act:

> . . . [t]he particular and immediate continuing objective of this Act is the protection and advantage of the consumers of electric energy throughout the United States and the protection of those who invest in the securities of the industry.
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> • • •
>
> These purposes and objectives are to be accomplished in the following way: First, by putting into action the authority of the Federal Government in a regulation which is not now carried out by the Federal Government; Secondly, by supplementing of State authority, with the Federal authority without impinging upon the proper functions of the State authority, *and Thirdly, the coordination of the Federal and State authorities so that the full force of a complete regulation may be exerted.*[30] (Emphasis added.)

Thus, according to Commissioner Seavey, the Act was intended not to supplant state authority but to comprehensively supplement it. Fulfillment of this goal of comprehensive regulation requires each regulatory authority to fully protect the customers falling under its jurisdictional umbrella.

Another broad objective of Part II of the Federal Power Act, as recognized by the Supreme Court in *Otter Tail Power Company* v. *United States*, 410 U.S. 366, 374

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[29] Hearings on H.R. 5423 and S.1725 Before the Comm'n on Interstate and Foreign Commerce, 74th Cong., 1st Sess. (1935).

[30] *Id.* at 391-92.

(1973), is the maintenance of competition to the maximum extent consistent with the public interest. In 1965 hearings before the Senate Commerce Committee, the existence of competition in the power industry and the threat it faces was well stated by the Federal Power Commission's Chairman:

> To the large privately-owned electric utility a retail customer, even a large industry, is simply a customer. However, a wholesale customer is frequently also a competitor, actual or potential. The customer at wholesale may not only be a competitor in the fringe area where the two systems are contiguous, but may also be a direct or potential competitor for the commercial and industry businesses that are able to take costs and conditions of electric service into account in deciding where to locate and which power supplier to patronize.
>
> The electric power wholesaler may in fact be seeking to put the retailer out of business. This is not merely theoretical. Every year many municipal systems succumb to purchase offers by investor-owned wholesale suppliers. In this respect, wholesale rate regulation in the electric power industry is unique and faces far greater resistence by the privately-owned utilities than retail rate making . . . The Nation values its pluralistic power economy and the role therein of the independent small-systems, public, cooperative, and investor owned. The necessity for Federal regulation to assure the survival of the small and medium-sized power systems is unmistakeable.[31]

The position now advanced by the Commission is that it cannot and will not consider the interrelationship of jurisdictional and non-jurisdictional rates.[32] This posture

[31] Hearings Before the Senate Committee on Commerce, 89th Cong., 1st Sess. on S.218 (Serial #89-38, 1965) at 68.

[32] In its brief to this Court the Commission asserts that it has been consistent in its interpretation of the discrimination provisions of the Act. (F.P.C. Brief at 12). It is interesting to note, however, that in *Pacific Gas and Electric Company*, 13 F.P.C. 2006 (1954), the Commission considered intrastate wholesale rates not subject to the Commission's jurisdiction when assessing the reasonableness of an interstate wholesale rate. *Id.* at 209.

leaves utilities unfettered by regulatory control if they desire to eliminate wholesale customers as competitors through the maintenance of discriminatory non-jurisdictional rates. Thus, the Commission's posture has the effect of creating a regulatory gap which undermines its ability to protect customers subject to its jurisdiction or to maintain competition within the power industry. It has been the position of the Supreme Court to construe Federal Power Commission jurisdiction to avoid gaps in its regulatory framework.[33] Certainly in light of the clear and expressed purpose of the Act the creating of such a gap by the Commission is improper.

Additionally, this Court previously has addressed the propriety of the FPC considering the interrelationship of jurisdictional and non-jurisdiction rates when interpreting Section 5(a) of the Natural Gas Act, 15 U.S.C. §§ 717-717w.[34] In *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635 (1945), this Court expressly acknowledged the propriety of such comparisons:

> The Commission, while it lacks authority to fix rates for direct industrial sales, may take those rates into consideration when it fixes the rates for interstate wholesale sales which are subject to its

[33] *See* United Gas Improv. Co. v. Continental Oil Co., 381 U.S. 392, 400 (1965), and discussion at pages 16-18, *supra*.

[34] The language of Section 5(a) of the Gas Act is virtually identical to the language of Section 206(a) of the Federal Power Act, and the rationale of the Court in construing the former is applicable to the latter. *See, e.g.*, FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956); Municipal Light Board v. FPC, 450 F.2d 1341 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); Wisconsin Michigan Power Company v. FPC, 197 F.2d 472 (7th Cir. 1952); FPC v. Arizona Edison Co., 194 F.2d 679 (9th Cir. 1952).

> jurisdiction. For § 5(a) 15 USCA § 717d(a), 4 FCA title 15, § 717d(a) provides that whenever the Commission "shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, *or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential*, the Commission shall determine the just and reasonable rate." (Italics added) It is clear that contracts covering direct industrial sales come within that italicized clause of § 5(a).[35]

It is significant to note that in discussing the authority of the Commission to consider rates for non-jurisdictional industrial sales the Court italicized that portion of the quoted section of the Natural Gas Act which reads:

> or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential

and then explained: "It is clear that contracts covering direct industrial sales come within that italicized clause. . . ." Thus, the Court emphasized the dichotomy between the first part of the clause, which addresses "any rate, charge, or classification . . . *subject to the jurisdiction of the Commission*," and the second part, which involves findings as to *any* rule, regulation, practice, or contract affecting such rate." (Emphasis added.) The latter part, as the Court clearly points out, includes non-jurisdictional rules, regulations, practices, or contracts inasmuch as they *affect* jurisdictional rates.

In addition to this clear explanation, the Court notes in footnote 5 of the *Gulf States*' decision that pursuant

[35] 324 U.S. at 646-47.

to the authority of Section 4(c) of the Natural Gas Act the Federal Power Commission requires the filing with it of certain contracts for non-jurisdictional, direct industrial sales.[36] Section 4(c) of the Natural Gas Act, is virtually identical to the language of Section 205(c) of the Federal Power Act. Additionally, Section 5(a) of the Natural Gas Act, interpreted in *Panhandle*, *supra*, and Section 206(a) of the Federal Power Act both contain the statutory admonition to consider any "practice or contract" *affecting* jurisdictional rates. In this case the "practice" consists of maintenance of discriminatory differentials embodied in the Company's industrial retail rate contracts.

Thus, faced with a price squeeze affecting competition by customers of a jurisdictional company, the statutory language of the Federal Power Act, which parallels the Natural Gas Act, requires the Commission to devise a method to eliminate the effect of this price squeeze upon wholesale customers. This proceeding devolves from the fact that the Federal Power Commission has elected to ignore the plain language of the Federal Power Act and seeks to divest itself of its statutory authority and shirk its statutory responsibility.

[36] 324 U.S. at 646-47. The note reads in full:

> There must be filed with the Commission not schedules of rates subject to the jurisdiction of the Commission but "the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." Section 4(c), 15 USCA § 717c(c), 4 FCA title 15, § 717c(c). By Rule 54.30 the Commission requires the filing with it of all contracts for direct industrial sales involving sales in excess of 100,000 Mcf per year. See 8 Fed. Reg. 16101.

III

A UTILITY WHICH VOLUNTARILY MAINTAINS DEPRESSED INTRASTATE RATES WHICH HAVE AN ANTICOMPETITIVE EFFECT MAY BE REQUIRED TO SET INTERSTATE RATES BELOW A LEVEL WHICH OTHERWISE WOULD BE APPROPRIATE.

The relief ordered by the Court below is entirely consistent with the Commission's obligation under Section 205 of the Act to establish just and reasonable rates. Under normal circumstances just and reasonable rates would be those sufficient to recover properly-allocated costs [37] as well as provide a just return on the property dedicated to the public use.[38] However, the Commission argues that under this standard

> [w]holesale rates must recover the cost of providing wholesale service, plus a reasonable return, and *the costs incurred in providing such service do not become otherwise improper or excessive because of allegations of anticompetitive conduct in unregulated matters.*[39] (Emphasis added.)

Thus, to the FPC it is not relevant that a wholesale rate, in conjunction with a voluntarily depressed comparable non-jurisdictional retail rate, has the *effect* of destroying competition. This narrow interpretation of the mandate of Section 205 is clearly erroneous.

First, the simple fact that a utility elects to maintain or set a non-jurisdictional rate comparable to a wholesale rate at a level below the wholesale rate, constitutes

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[37] Mississippi River Fuel Corp. v. FPC, 163 F.2d 433 (D.C. Cir. 1947).

[38] FPC v. Hope Nat. Gas Co., 320 U.S. 591 (1943); Bluefield Waterworks & Improve. Co. v. Public Svc. Comm'n, 262 U.S. 679 (1972).

[39] FPC Brief at 32.

persuasive evidence that the utility considers the lower level to be just and reasonable. In *Otter Tail Power Company*, 2 F.P.C. 134 (1940), the Commission gave note to this reality when it observed:

> We point out, too, that the [utility], itself, fixed the Fergus Falls rate and there is nothing before us to show that the [utility] voluntarily undertook to serve Fergus Falls under such conditions as would result in confiscation of the [utility's] property. In this connection we are reminded, as Mr. Justice Cardozo pointed out in *Dayton Power and Light Company* v. *Public Utilities Commission*, 292 U.S. 290, 312, that:
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> > "It is a strain on credulity to argue that the appellant, when putting into effect a new schedule of charges, was satisfied with one productive of so meager a return * * * The argument proves too much; * * * Men do not transact business without protest at confiscatory rates, at all events in the absence of extraordinary circumstances making submission to the loss expedient * * *." [40]

Consequently, absent a clear showing that the disparity is justified by *costs*, it cannot be said that setting the jurisdictional rate at the lower level is unjust or unreasonable. The decision of the Court below gave cognizance to this fact when it provided:

> When costs are fully allocated, both the retail rate and the proposed wholesale rate may fall within a zone of reasonableness, yet create a price squeeze between themselves. There would, at the very least, be latitude in the FPC to put wholesale rates in the lower range of the zone of reasonableness, without concern that overall results would be impaired, in view of the utility's own decision to depress certain

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[40] 2 F.P.C. at 146.

retail revenues in order to curb the retail competition of its wholesale customers.[41] [Footnotes deleted.]

Indeed, in its 1940 *Otter Tail* decision, the Commission itself recognized this possibility:

> It occurs to us that one rate in its relation to another rate may be discriminatory, although each rate *per se*, if considered independently, might fall within the zone of reasonableness. There is considerable latitude within the zone of reasonableness insofar as the level of a particular rate is concerned. The relationship of rates within such a zone, however, may result in an undue advantage in favor of one rate and be discriminatory insofar as another rate is concerned. When such a situation exists, the discrimination found to exist must be removed.[42]

Furthermore, in this 1940 *Otter Tail* decision, the Commission did not resort to strained legalisms to limit its jurisdiction. It instead recognized its responsibilty to interpret the Federal Power Act in such a way as to give full force and effect to its Congressional mandate to regulate interstate rates:

> Statutes should not be literally interpreted at the expense of the reason of the law and so as to produce absurd consequences or flagrant injustice. They are to be construed "so as to avoid absurd or glaringly unjust results." *Sorrells* v. *United States*, 287 U.S. 435, at 450 (1932).[43]

The position now advanced by the Commission before this Court urges an absurd result: it would require the Commission to authorize to a utility rates which, in conjunction with other rates set by the utility, would

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[41] 510 U.S. at 1274.

[42] 2 F.P.C. at 149.

[43] *Id.* at 137.

destroy competition. Furthermore, inasmuch as the higher rates imposed on wholesale jurisdictional customers by the Commission would provide profits to the utility which may be used to support the lower, predatory rates, the Commission's interpretation compels wholesale customers to subsidize the destruction of their viability as competitors.

Additionally, even if it clearly and convincingly is established that the non-jurisdictional rates are non-compensatory to the utility in that they fail to recover costs or provide a return on investment, it is not necessarily improper to set jurisdictional rates at the same level if such action is required to offset the anticompetitive effect of the lower non-jurisdictional rate. The public interest, as expressed in Sections 205 and 206 of the Federal Power Act and Section 2(a) of the Clayton Act, as amended by Section 13(a) of the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13(a), must be accorded a higher priority than the economic self interest of a particular power supplier. This fundamental principle was affirmed by this Court in *Otter Tail Power Company* v. *United States*, 410 U.S. 366 (1973), a case that evolved from the refusal of the Otter Tail Power Company to deal with certain municipalities in its service area when the municipalities sought to establish public power systems. The district court had found Otter Tail's practices to be in violation of the antitrust laws[44] and had entered a broad decree designed to cure the prohibited practices and prevent their recurrence. In upholding the lower court's decision, the Supreme Court dismissed Otter Tail's expressed concern for its financial posture by noting:

> Otter Tail argues that, without the weapons which it used, more and more municipalities will turn to

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[44] United States v. Otter Tail Power Co., 331 F. Supp. 54 (1971), *modified*, 410 U.S. 366 (1973).

public power and Otter Tail will go downhill. The argument is a familiar one. It was made in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, a civil suit under § 1 of the Sherman Act dealing with a restrictive distribution program and practices of a bicycle manufacturer. We said: "The promotion of self interest alone does not invoke the rule of reason to immunize otherwise illegal conduct." *Id.*, at 375.

The same may properly be said of § 2 cases under the Sherman Act. That Act assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency. Otter Tail's theory collides with the Sherman Act as it sought to substitute for competition anticompetitive uses of its dominant economic power.[45]

Surely it is inconsistent with the above principles to permit a utility that *voluntarily* sets or maintains depressed, non-compensatory rates which have the effect of creating an anticompetitive price squeeze on wholesale customers to justify the perpetuation of the illegal discrimination by claiming economic detriment should the higher rates be lowered. Any economic loss which might follow is within the power of the utility to avoid by terminating its illegal activity. Neither Section 205 (a) of the Federal Power Act nor the decisions of this Court in *Hope* and *Bluefield* need be interpreted as requiring the Federal Power Commission to ignore the predatory pricing of a utility subject to its jurisdiction when it has at its disposal the means to remedy such conduct through the reduction of wholesale rates. It is true that the Commission has the obligation of establishing just and reasonable rates; however, they must be just and reasonable to both the utility and cus-

[45] 410 U.S. at 380.

tomer.[46] Rates which have the effect of furthering a predatory pricing policy cannot be said to be reasonable to the consumer. Conversely, rates which have the effect of countering such a policy cannot be said to be unreasonable to the utility.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should affirm the decisions reached by the Court of Appeals.

Respectfully submitted,

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[46] *See, Hope* and *Bluefield, supra* note 21.